

Chapter 6

Other Things You Should Know

Abandonment, Settlement, and Dismissal

At some point in the process we just described, the appellant may decide to abandon the appeal. If this happens before the record has been filed, the appellant should file a written abandonment or stipulation for abandonment at the **appeals section** of the superior court, and the appeal will be dismissed. (CRC rule 20(a).) If the clerk's transcript has not been completed, the portion of the deposit that has not been used should be refunded. (CRC rule 5(d).) If it is after the record has been filed, the appellant should file a written abandonment or stipulation to dismiss in the Court of Appeal. At this stage, the court has the discretion to accept or deny the request. (CRC rule 20(c).)

If the parties are able to agree on a settlement of their differences, the appellant should immediately notify the court in writing that the matter has settled and request a dismissal of the appeal.

If at any time the *respondent* believes the appeal should be dismissed, the respondent should file a motion to dismiss. If the *Notice of Appeal* is late, or "untimely," the court has no power to hear the appeal, and the case will be dismissed. If the ruling is not appealable, the court may dismiss or it may elect to hear the case as a writ. The court will exercise its discretion in considering other dismissal motions, and may deny such motions if the issues raised in the appeal are in the public interest.

Motions

When do you file a motion? If there are problems with the record, a need for more time to complete a task, a desire for preference or priority in getting the court to handle the case or any problem other than the failure to file a timely *Notice of Appeal*, you can file a motion or application asking the court to take care of the problem. (See, CRC rules 19, 41, 43.)⁴

What kinds of motions are there? Any kind of request of the Court of Appeal (for example, for an extension of time) is made by motion or application. The most commonly used motion, known as a motion to augment, is to add missing or overlooked items to the record. (See, "Record Problems" following Option 6c, Chapter 3, pages 17 & 18, about items missing from the record.) A motion can also

⁴ CRC rule 41 covers "motions in the reviewing court," and rule 43 deals with "applications on routine matters." According to rule 43, routine matters cover extensions of time and "other matters of routine." This court does not differentiate among motions, applications, and requests.

be used to vacate a dismissal that has been entered against you, to consolidate two cases, and so forth.

How is a motion prepared? The motion should be typewritten, with *Proof of Service* on all counsel and self-represented parties, and an original and three copies filed with the Court of Appeal. (CRC rules 41(a), 44(b).) You need to tell the Court of Appeal why you are making the request (show “good cause”), provide additional information that might be relevant, and let the Court of Appeal know what it is you want it to do (such as grant preference in the Court of Appeal in the processing of your case based on a terminal illness, add to the record, take judicial notice, etc.). Along with the motion should be points and authorities to support the request and documentary evidence (declarations and exhibits) if it is needed to support your request. Points and authorities are just that: the points set out the argument you wish to make, and the authorities give the legal reasons that the motion should be granted or denied (see Sample L). At least one declaration should, under penalty of perjury, identify the facts surrounding the request, what you have done or attempted to do to take care of the problem, what you want the court to do, and why it is necessary (see Sample M). Where motions are defective, the court may deny the motion “without prejudice,” which means the applicant may correct whatever problems there are and refile the motion.

Any opposition to the motion should be filed within 10 days (15 days if the motion was served by mail) from the date of service. Most motions are not ruled on until the time to file the opposition has passed. Generally there is no hearing on a motion.

What is a motion to augment? A motion to augment the record is used when items are missing from the record on appeal (the clerk’s or reporter’s transcript). (See Samples N and O).

If the superior court clerk or reporter failed to include something that was designated in your designation of record, you do not need to file a motion to augment. Instead, serve and file a notice to correct the record in the superior court, asking that the missing items be copied and sent to be added to the record. (CRC rule 12(b).) At the same time, you need to serve on the Court of Appeal and all parties copies of the notice to correct the record. The clerk or reporter must comply within 10 days. If the clerk or reporter does not, you then need to file a motion to augment. However, if you already have a copy of the document that the superior court clerk omitted, it may be faster and cheaper to file a motion to augment to which you just attach the document instead of filing a notice to correct the record.

If new material is to be added to the record because the appellant or respondent forgot to designate it or did not know at the time that it would be needed, a motion to augment must be filed with the Court of Appeal. Each item requested must be a part of the record that was before the superior court such as a document that was filed in the superior court, received in evidence, or lodged with the court or a transcript of oral proceedings. An item that was “lodged” with the court (rather than being filed) was returned to the parties and thus is not physically in the superior

court file or in the custody of the court. Any document or transcript that is available should be attached to the motion. The court, if it grants the motion, then augments its record with the documents or transcripts included with the motion. Sample N is a *Motion to Augment Record on Appeal* with documents attached.

If copies are not available, the items must be identified as they are in a designation of the record so that the superior court can prepare the needed clerk's and/or reporter's transcripts. These added transcripts are called **"supplemental clerk's and/or reporter's transcripts"** if the motion is granted. (CRC rule 12.) Sample O shows a *Motion to Augment* where the documents must be copied by the superior court to prepare a supplemental clerk's transcript. Sample P is a *Motion to Augment Record on Appeal* with reporter's transcript.

If you need to have a supplemental clerk's and/or reporter's transcript prepared, it will take some time. The superior court will prepare an estimate of the cost of preparing the supplements. After the estimate is paid, the superior court is usually given 30 days to actually prepare the materials. If your brief is due within this time, your motion to augment should include a request to extend the deadline for filing the brief to 30 days after the supplemental transcript is filed. The title of your document should be "Motion to Augment the Record and Application to Extend Time to File [Appellant's Opening, or Respondent's or Appellant's Reply] Brief."

What is a request for extension of time?⁵ The parties may stipulate (agree) to extend the briefing time up to 60 days for each type of brief by filing one or more stipulations in the Court of Appeal before the brief is due. The stipulation must be signed by and served on all parties. Only one signature on the copy filed with the Court of Appeal needs to be an original.

If a party needs more than the 60 days already stipulated to, or if the opposing party refuses to stipulate to an extension, the party needing the extension must file a motion for extension of time (see Sample Q). The party seeking additional time must give reasons, also known as **"good cause,"** why that extension is needed. In addition, the applicant for an extension of time should explain either that (1) the applicant was unable to get the agreement of the other party to a stipulated extension or (2) the parties have already stipulated to the maximum 60 days and the applicant now is seeking permission of the court for a further extension. (CRC Rule 15(b).)

An *Application for Extension of Time to File Brief* (Sample Q) should include the current deadline for the brief or item, the length of the requested extension, any previous applications that have been granted or denied, and any notices that have been issued under CRC rule 17, in addition to a statement of good cause (the reason). (CRC rules 43, 45.5.) You need to file with the court an original, *Proof of Service* of the request on all parties, and self-addressed, postage prepaid envelopes

⁵ CRC rule 43 covers "applications on routine matters" including extensions of time and "other matters of routine." This court makes no distinctions among motions, applications, and requests. Rule 15(b) specifically covers extensions of time for briefs.

for mailing the order that grants or denies the application to all counsel and self-represented parties. In a civil case, a represented client must be served by his or her attorney with any request for extension of time, with a copy accompanying his or her application to the Court of Appeal. Evidence of this need not include the client's address. (CRC rule 43, 45(f).)

Most often, applications for extension of time are ruled on without waiting for opposition. Thus, if you wish to oppose an application for extension of time, you must file the opposition (or call the clerk's office and let them know you will be filing an opposition) right away.